PERKINSCOIE

700 13th Street, NW
Suite 600
Washington, DC 20005-3960

+1.202.654.6200
+1.202.654.6211
perkinscoie.com



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Brian G. Svoboda
BSvoboda@perkinscoie.com
D. (202) 434-1654
F. (202) 654-9150

**BY HAND DELIVERY**

Jeff Jordan, Esq.
Office of General Counsel
Federal Election Commission
999 E. Street, N.W.
Washington, DC 20463

**Re: AR 15-02**

Dear Mr. Jordan:

We write as counsel to the Democratic Party of Wisconsin ("DPW" or "the Party") and Michael Childers in his official capacity as Treasurer (collectively, "Respondents"), in response to the referral in AR 15-02.

The bulk of the activity at issue in this referral falls into two categories: (1) financial activity that the Party actually did disclose, although not in the specific way the Commission prescribed; and (2) the Committee's recordkeeping for payroll expenses, when there was no dispute as to whether the Committee paid the staff correctly, and when the employees were engaged heavily in nonfederal activity. We would respectfully submit that enforcement on these facts is neither warranted nor necessary, and request that the Commission close the file and take no further action.

## I. FACTUAL AND PROCEDURAL BACKGROUND

This matter results from the FEC Audit Division's audit of the Party's activities during the 2011-12 election cycle. The Commission selected respondents for audit on November 30, 2012, before the election cycle was even over.[1] Nonetheless, as the Commission's Final Audit Report shows, the DPW complied with the requests and recommendations of the Audit Division at all steps of the audit process, including working closely with the auditors and amending its reports to conform in all respects to the auditors' recommendations. The Party has taken additional steps to strengthen its compliance with the Act and Commission regulations, as the Final Audit Report also reflects.

[1] The Commission's notification letter even said that the Party would be audited for reports it had yet to file and sought records that did not even yet exist. *See* Letter from Thomas A. Hintermister, Assistant Staff Director, Audit Division, to Michael F. Childers, Treasurer, Democratic Party of Wisconsin (Dec. 4, 2012) (informing the Party of a review of reports "through December 31, 2012" and seeking records "through March 31, 2013").

During the 2011-12 election cycle, the Party engaged in an unprecedented number of nonfederal elections, and thus in an unprecedented and unexpected amount of purely nonfederal activities. The nonfederal elections arose unexpectedly in 2011 and 2012 from public petitions initiating the recall of thirteen state senators, the state lieutenant governor, and the governor. These elections garnered nationwide attention at the time due to Wisconsin Governor Scott Walker's proposed budget bill and the mass public demonstrations against it.

The DPW engaged in each of the following nonfederal elections in 2011 and 2012:

- On April 5, 2011, Wisconsin held a General Election for one state supreme court seat. The supreme court election also received nationwide publicity due to the candidates' positions on Governor Walker's proposed budget reforms.
- On May 3, 2011, Wisconsin held a Special Election for one state assembly district.
- On July 12, 2011, Wisconsin held Primary Recall Elections for six state senate districts.
- On July 19, 2011, Wisconsin held a General Recall Election for one state senate district, and Primary Recall Elections for two state senate districts.
- On August 9, 2011, Wisconsin held General Recall Elections for six state senate districts.
- On August 16, 2011, Wisconsin held General Recall Elections for two state senate districts.
- On November 8, 2011, Wisconsin held a Special Election for one state assembly district;
- On February 21, 2012, Wisconsin held its Spring Primary Election for various local elections including county boards and city councils.
- On April 3, 2012, Wisconsin held its Spring General Election for various local elections including county boards and city councils. Wisconsin also held its federal Presidential Preference Vote on this date.
- On May 8, 2012, Wisconsin held Primary Recall Elections for four state senate districts, lieutenant governor, and governor.
- On June 5, 2012, Wisconsin held General Recall Elections for four state senate districts, lieutenant governor, and governor.

- On August 14, 2012, Wisconsin held its Fall Primary Elections for state assembly and state senate races across the state. Federal primary elections were also held on this date.

- On November 6, 2012, Wisconsin held General Elections for state assembly, state senate, federal Congressional, federal Senate, and Presidential elections. The Presidential, Senate and Congressional races were especially competitive, as were several of the nonfederal elections. Additionally, party control of the state senate was at stake.

The unanticipated level of nonfederal activity, combined with the complexity of the Commission's regulations as they apply to state party committees, placed extraordinary burdens on the Party during the 2012 election cycle. Despite these burdens, the substantial majority of the Party's alleged reporting discrepancies involved the form of the disclosure provided, not its substance. For example, on a single monthly report, the DPW correctly reported transfers from two joint fundraising representatives, but incorrectly reported the underlying individual joint fundraising contributions. This reporting error occurred simply because the wrong box was selected in the DPW's campaign finance reporting software. As a result, $457,814 in joint fundraising contributions were reported as direct contributions and not memo entries. Again, these contributions – which account for over 58% of the alleged misstatement amount in 2012 – were reported to the Commission on a timely, individualized basis, even if the DPW's cash position was incorrectly stated after the clerical error.

Second, the DPW also reported vendor refunds as negative entries on Schedule B for Itemized Disbursements. These transactions – which totaled $57,545 for 2011 and $15,312 for 2012 – were, in fact, disclosed on the public record before the audit was initiated. The auditors assert that these amounts should instead have been reported as offsets to operating expenditures on Schedule A. However, the Commission's Reports Analysis Division never sent the Party a Request for Additional Information or otherwise instructed the Party during the 2012 election cycle that its reporting of vendor refunds as negative entries on Schedule B was not correct.

Third, DPW inadvertently reported three duplicate payments to a single vendor during a single reporting period. These duplicate payments totaled $517,424. In short, over 65 percent of the total alleged misstatement for 2012 resulted not from disbursements being withheld from the public record, but rather reported on the public record twice.

As the Commission stated in its Final Audit Report, "the Audit staff agreed that vendor refunds and the joint fundraiser receipts were included in DPW's original disclosure reports." Indeed, when for all of the financial activity that the DPW reported but that the auditors assert was reported incorrectly is removed from the misstatement calculation, the remaining misstatement of financial activity is *de minimis*. Specifically, in 2011, the remaining understatement of receipts and understatement of disbursements each comprise less than one-third of one percent of the DPW's total disbursements and receipts in the election cycle. In 2012, the resulting

overstatement of receipts is even smaller – less than one tenth of one percent – and the overstatement of disbursements is also less than one-third of one percent of the committee's total financial activity in the cycle.

During this time, the DPW had five paid staff members and several volunteer assistants whose primary responsibilities included ensuring the DPW's compliance with Commission regulations. DPW staff members also attended three separate FEC training seminars and webinars in 2011 and 2012. Since the 2012 election cycle, DPW staff have continued to attend training seminars or webinars and have worked to refine their internal compliance practices.

## II. LEGAL DISCUSSION

On these facts, in which the burdens facing the Party were extreme as a result of the large number of nonfederal elections, and where the nature and consequence of the Party's asserted errors were actually small, the Commission should close the file and take no further action.

### A. Finding One: Misstatement of Financial Activity

#### 1. Respondents Substantially Complied with the Act and Commission Regulations

Commission regulations require that a committee's disclosure reports be accurate. *See* 11 C.F.R. § 104.14(d). However, compliance with the Commission's reporting requirements is not governed by a strict liability standard. *Lovely v. Fed. Election Comm'n*, 307 F.Supp. 2d. 294, 300 (D. Mass. 2004). Rather, "[w]hen the treasurer of a political committee shows that best efforts have been used to obtain, maintain and submit the information required by the Act for the political committee, any report of such committee shall be considered in compliance with the Act." 11 C.F.R. § 104.7(a); *see also* 2 U.S.C. § 432(i). The best efforts safe harbor applies not only to collecting information for reports, but also to reporting information to the Commission. *See Lovely*, 307 F.Supp. 2d at 299 (the "argument that [best efforts] does not apply to the submission of reports conflicts with the plain statutory language.").

Congress's intent in installing the best efforts provision in the Act was not to have the Commission further investigate committees that made only *de minimis* errors in the face of the "very, very rigid" requirements of the statute, but rather to consider such committees in compliance with those requirements. *See* MURs 5971 and 6031, Statement of Reasons of Vice Chairman Petersen and Commissioners Hunter and McGahn (quoting 122 Cong. Rec. 7,196 (1976) (statement of Sen. Stevens)). The sponsor of the best efforts provision, Senator Packwood, explained the law as an "anti-nit-picking amendment" that "merely says that if a finding is made that [the committee] tried in good faith to try to comply with the law they shall not be harassed." *See id.* (quoting 122 Cong. Rec. 7,922-23 (1976) (statement of Sen.

Packwood)). The amendment's author, Senator Stevens, similarly said that the provision was meant to address Congress's concern about the "nit-picking that has been going on about these reports." *Id.* (quoting 122 Cong. Rec. 7,196 (1976) (statement of Sen. Stevens)).

It is the Commission's stated policy to "conclude that a committee has shown best efforts" where, for example, the committee double-checked the information entered on its reports; had trained staff responsible for compiling and submitting reports; and took reasonable steps to file amend previously-filed reports. Statement of Policy Regarding Treasurers' Best Efforts to Obtain, Maintain and Submit Information as Required by the Federal Election Campaign Act, 72 Fed. Reg. 31,438-01, 31,440 (June 7, 2007) (hereinafter Best Efforts Policy Statement).

Respondents met the Commission's standard for best efforts. Respondents reported a total of $39,767,185 in receipts and disbursements for the 2011-12 election cycle. During this time, Respondents filed every single report required by the Act on a timely basis. This level of compliance is evidence that the DPW had internal controls and trained staff in place to achieve compliance with the Act's reporting requirements.

The small handful of errors that the Audit Report disputes occurred during a period where the DPW was engaged in an extraordinary account of nonfederal election activity. In fact, when viewed in light of the overall amount of receipts and disbursements in the election cycle, DPW's receipt and expenditure reporting record was nearly perfect: the Commission's Audit Report identifies mere fractions of a percent of the DPW's overall reportable activity that – while reported on the public record on a timely basis – was reported in a manner that resulted in the DPW's cash position being inaccurate.

When the Party was made aware of these errors, it cooperated with the Commission at every turn and amended its reports to ensure the public record was complete and correct, further demonstrating their best efforts. To pursue enforcement against Respondents under these circumstances would constitute just the sort of "nit-picking" Congress meant to prevent when enacting the best efforts standard. At the same time, the reporting obligations imposed on the DPW are vastly more complex than those that existed when Congress enacted the "best efforts" provision in the 1970s.

Accordingly, rather than further penalizing the DPW, and, in the process, undermining the incentive for other committees to comply with the Commission's audit process and amend reports to correct the public record, the OGC should recognize that because the DPW "has exercised ... best efforts, the committee is in compliance." Best Efforts Policy Statement, 72 Fed. Reg. at 31,439 (quoting H.R. Rep. No. 96-442, at 14 (1979)).

**2. The Other Circumstances Counsel Toward Closing the File and Taking No Further Action**

To apply normal enforcement procedures to disclosure issues that, in the main, hinged on form and not substance would generate an arbitrary and grossly disproportionate result. Treating the Commission's findings for enforcement purposes exactly the same as if the DPW had omitted actual transactions or failed to file entire reports – rather than, as is the case in fact, disclosed a *de minimis* number of transactions in a way that misstated the DPW's cash position – is inconsistent with the Commission's duty to "treat like cases alike." *Bush-Quayle '92 Primary Committee, Inc. v. FEC*, 104 F.3d 448, 454 (D.C. Cir. 1997). *See also* 5 U.S.C. § 706 (barring agency conduct that is arbitrary, capricious and contrary to law).

Moreover, a court hearing this matter de novo would be required to consider factors that would weigh heavily against a penalty. Specifically, the court must consider (1) the good or bad faith of the respondent; (2) the injury to the public; (3) the defendant's ability to pay, and (4) the need to vindicate the Commission's authority. *See FEC v. Furgatch*, 869 F.2d 1256, 1258 (9th Cir. 1989). *Accord FEC v. Friends of Jane Harman*, 59 F. Supp.2d 1046, 1058 (C.D. Cal 1999).

First, there is no suggestion here that the Audit Division's findings resulted in any way from bad faith. Nor is there a clear basis to assert public injury: the DPW complied with the limits and source restrictions that are the centerpiece of the Act, reported its activity on the public record on a timely basis, and reported all but a *de minimis* amount of its activities accurately. As "any injury to the public is remote and circumscribed," enforcement is "inappropriate." *See FEC v. Kalogianis*, No. 8:06-cv-68, 2007 WL 4247795 (M.D. Fla. Nov. 30, 2007). Indeed, there is a high likelihood that the Commission would collect no civil penalty whatsoever if enforcement were to proceed to a judicial action, as it is clear from the record that Respondents' alleged violations "were not deliberate violations of the federal election laws." *FEC v. Friends of Jane Harman*, 59 F. Supp. 2d 1046, 1057, 1059 (C.D. Cal. 1999) (holding that a civil penalty was not warranted where there were no "deliberate or serious violations" of federal election law, and where there was no evidence of bad faith).

Finally, the Commission does not need to vindicate its authority through enforcement in this case. The Supreme Court has recognized only one state interest to justify the Act's prohibitions and limits: preventing corruption or the appearance of corruption. *See Citizens United v. FEC*, 558 U.S. 310 (2010). At the same time, the Commission has spoken about the need to address "the challenges faced by political parties engaged in federal campaign finance activity." News Release, FEC Chairman Goodman and Vice Chair Ravel Host Political Party Forum (June 4, 2014. Accordingly, there is no agency interest that is served in pursuing enforcement under these facts.

**B. Finding Two: Recordkeeping for Employees**

The record is clear that the DPW paid properly for its employee salaries and benefits. The Final Audit Report correctly contains no finding that the DPW used nonfederal funds for federal election activity.

Still, the referral would seek enforcement over the Party's failure to keep a monthly log of the percentage of time each employee spends in connection with a federal election, even if the employee is engaged solely in nonfederal election activity. *See* 11 C.F.R. § 106.7(d)(1).

Employee recordkeeping is one of the most common findings in recent Commission audits of state and local parties, and the scope of the Commission's jurisdiction over a party's payments to employees with nonfederal funds for exclusively nonfederal work has been the subject of intense Commission debate. At an open meeting of the Commission in January 2014, Commissioner Goodman questioned whether the log requirement should be applied when the party employees were paid only with nonfederal funds and worked only on nonfederal campaigns. He argued that because the Commission has no jurisdiction over purely state-level activity, these employees should not be required to keep payroll logs. *See* FEC Agenda Document No. 14-9, Minutes of an Open Meeting of the FEC (Jan. 16, 2014).

The Commission has also debated whether parties were required to keep the logs when the employees were paid entirely with federal funds. It found that the logs were required, but declined to pursue recordkeeping violations against a Committee that failed to keep such logs under the circumstances. *See* Request for Consideration of a Legal Question, LRA 917 (Nov. 30, 2012). Indeed, the "soft money" concerns of the Act and Commission regulations are absent in such circumstances.

The Commission has correctly excluded from the findings in this matter any amounts with respect to DPW employees paid with 100 percent federal funds and reported as such. The Commission should similarly not find reason to believe that Respondents violated Commission regulations with respect to other employees who worked predominantly in nonfederal campaigns, and whom the record shows to have been paid properly. At the very least, the combination of the DPW's extraordinary amount of nonfederal election activity in the 2011-2012 cycle; the burdensome requirements to keep employee time logs; and the lingering questions over the Commission's jurisdiction over such time logs in the context of purely nonfederal payroll warrants the exercise of the Commission's prosecutorial discretion to decline pursuing recordkeeping violations under these facts. *See Heckler v. Chaney*, 470 U.S. 821 (1985).

## III. CONCLUSION

For the foregoing reasons, OGC should recommend that the Commission close the file and take no further action in this matter.

Very truly yours,

Brian G. Svoboda
Tyler J. Hagenbuch
Counsel to Respondents